No. 34152

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Appellant,

v.

From the Circuit Court of Brooke County, West Virginia Civil Action No. 07-C-78 Honorable Arthur M. Recht

JENNIFER BONIEY,

Appellee.

BRIEF ON BEHALF OF APPELLEE, JENNIFER BONIEY

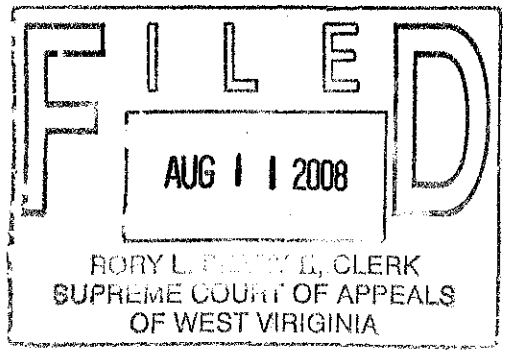

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

Constitution

Statutes

Rules

This brief is filed pursuant to Rule 10 of the Rules of Appellate Procedure, as amended, on behalf of the appellee, Jennifer Boniey.

PROCEDURAL HISTORY

On May 2, 2007, the appellee, Jennifer Boniey, instituted a civil action against Brian Kuchinski, an uninsured motorist. The appellee also served State Farm Mutual Automobile Insurance Company ("State Farm"), Ms. Boniey's uninsured motorist carrier.

On May 31, 2007, State Farm filed a motion to dismiss, and thereafter on July 16, 2007, State Farm filed a motion for summary judgment. In response, Ms. Boniey filed a cross-motion for summary judgment on August 2, 2007.

This case originally came on for hearing on August 24, 2007, before the Honorable Arthur M. Recht, Judge of the First Judicial Circuit, Brooke County, at which time Judge Recht considered the respective motions for summary judgment and responses thereto.

After reviewing the motions, briefs in support thereof and considering the arguments of counsel, Judge Recht directed counsel to file supplemental briefs on the sole issue of the validity of the exclusion found in the State Farm policies, more particularly that which seeks to exclude an ATV from the definition of an "uninsured motor vehicle", and whether the exclusion violates W.Va. Code 33-6-31. Both parties filed supplemental briefs on the issue as requested by the lower court.

By Memorandum of Opinion and Order dated September 14, 2007, Judge Recht ruled that State Farm's exclusion of an ATV from the definition of an "uninsured motor vehicle" was violative of W.Va. Code 33-6-31. Consequently, the lower court granted Ms. Boniey's motion for summary judgment. It is from this opinion and order that State Farm appeals.

STATEMENT OF FACTS

On May 8, 2005, the appellee, Jennifer Boniey, was a passenger on an all-terrain vehicle (ATV) owned and operated by Brian Kuchinski. As a result of Mr. Kuchinski's negligence in operating the ATV, Ms. Boniey was seriously injured and has incurred over $20,000.00 in medical bills to date.

At the time of the incident causing Ms. Boniey's injuries, Mr. Kuchinski had a policy of insurance with GEICO Insurance Company which provided coverage for his automobile, but which policy did not include his ATV. Ms. Boniey was an "insured" under two policies of insurance issued by State Farm which contained uninsured motorist coverage ("UM"), which policies provide $20,000.00 and $100,000.00 in UM coverage respectively.

GEICO denied liability coverage for Mr. Kuchinski's use of the ATV, as it was an owned but not insured motor vehicle. Thus, Ms. Boniey submitted a claim for uninsured motorist coverage; however, State Farm denied uninsured motorist coverage on the basis that an ATV does not qualify as an "uninsured motor vehicle" under either of the aforementioned policies.

Consequently, Ms. Boniey filed this civil action and served her uninsured motorist carrier, State Farm, pursuant to law, in order to recover her UM benefits.

I S S U E

Whether the exclusionary language in the State Farm policies, which seeks to exclude an ATV from the definition of "uninsured motor vehicle", is void and ineffective under the uninsured motorist statute, W.Va. Code 33-6-31.

STANDARD OF REVIEW

A circuit court's entry of summary judgment is reviewed *de novo*. *Painter v. Peavy*, 192 W.Va. 189, 451 S.E.2d 755 (1994).

Where the issue on appeal from the circuit court is clearly a question of law or involving an interpretation of a statute, we apply a *de novo* standard of review. *Chrystal R.M. v. Charlie A.L.*, 194 W.Va. 138, 459 S.E.2d 415 (1995).

POINTS AND AUTHORITIES

1. Rule 56 of the W.V.R.C.P. is designed to effect a prompt disposition of controversies on their merits without resort to a lengthy trial if there essentially is no real dispute as to salient facts or if it only involves a question of law. *Larew v. Monongahela Power Co.*, 487 S.E.2d 348 (W.Va. 1997).

2. If there is no genuine issue as to any material fact, summary judgment should be granted. *Aetna Cas. & Sur. Co. v. Federal Ins. Co.*, 133 S.E.2d 770 (W.Va. 1963).

3. Determination of the proper coverage of an insurance contract, when the facts are not in dispute, is a question of law. *Tennant v. Smallwood*, 568 S.E.2d 10 (W.Va. 2002).

4. "Insurers may incorporate such terms, conditions and exclusions in an automobile insurance policy as may be consistent with the premium charged, so long as any such exclusions do not conflict with the spirit and intent of the uninsured and underinsured motorists statutes." Syllabus pt. 3, *Deel v. Sweeney*, 181 W.Va. 460, 383 S.E.2d 92 (1989), and Syllabus pt. 1 *Imgrund v. Yarborough*, 199 W.Va. 187, 483 S.E.2d 533 (1997).

5. When an insurer incorporates, into a policy of motor vehicle insurance, an exclusion pursuant to W.Va. Code §33-6-31(k) (1995) (Repl. Vol. 1996), the insurer must adjust the corresponding policy premium so that the exclusion is "consistent with the premium charged". Syllabus point 5, *Mitchell v. Broadnax*, 537 S.E.2d 882 (W.Va. 2000).

6. When an insurer has failed to satisfy the statutory criteria of W.Va. Code §33-6-31(k) (19985) (Repl. Vol. 1996) requisite to incorporating an exclusion in a policy of motor vehicle insurance, the enforcement of such an exclusion is violative of this State's public policy. Syllabus point 6, *Mitchell v. Broadnax*, 537 S.E.2d 882 (W.Va. 2000).

7. "An insurer wishing to avoid liability on a policy purporting to give general or comprehensive coverage must make exclusionary clauses conspicuous, plain, and clear, placing them in such a fashion as to make obvious their relationship to other policy terms, and must bring such provisions to the attention of the insured". Syllabus point 10, *National Mutual Insurance Co. v. McMahon & Sons, Inc.*, 177 W.Va. 734, 356 S.E.2d 488 (1987).

8. "The doctrine of reasonable expectations is that the objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations". Syllabus pt. 8 *Mutual Ins. Co. v. McMahon & Sons, Inc.*, 356 S.E.2d 488 (W.Va. 1987).

9. "Where the policy language involved is exclusionary, it will be strictly construed against the insurer in order that the purpose of providing indemnity not be defeated". Syllabus point 5, *National Mutual Ins. Co. v. McMahon & Sons, Inc.*, 177 W.Va. 734, 356 S.E.2d 488 (1987).

10. "Statutory provisions mandated by Uninsured Motorist Law, W.Va. Code, §33-6-31 may not be altered by insurance policy exclusions." Syllabus pt. 3, *Deel v. Sweeney*, 181 W.Va. 460, 383 S.E.2d 92 (1989), and Syllabus pt. 1 *Imgrund v. Yarborough*, 199 W.Va. 187, 483 S.E.2d 533 (1997).

11. The pre-eminent public policy of the Uninsured Motorist Statute is to provide full compensation to an injured person for his or her damages not compensated by a negligent tortfeasor. *Pristavec v. Westfield Insurance Company*, 184 W.Va. 331, 400 S.E.2d 575 (1990).

12. The primary, if not sole purpose of mandatory uninsured motorist coverage, is to protect innocent victims from the hardships caused by negligent, financially irresponsible drivers. *Perkins v. Doe*, 177 W.Va. 84, 87, 350 S.E.2d 711, 714 (1986).

ARGUMENT

There is no dispute that the motor vehicle on which Jennifer Boniey was a passenger at the time she suffered serious physical injuries was an "uninsured motor vehicle". First of all, GEICO has denied liability coverage for the

negligence of their insured, Mr. Kuchinski. Further, despite State Farm's contention to the contrary, an ATV is clearly defined by the West Virginia Supreme Court in *State of West Virginia ex rel. Sergent v. Nibert*, 648 S.E.2d 26 (W.Va. 2007) and by the applicable West Virginia statutes, 17A-1-1(b) and 17F-1-9 as a "motor vehicle". The sole issue in this matter, then, centers around State Farm's exclusionary language which seeks to exclude uninsured motorist coverage when the uninsured motor vehicle is an ATV, while being operated off the public roadways, notwithstanding that an ATV is a motor vehicle.

The appellee, Jennifer Boniey, is seeking uninsured motorist coverage through her insurer, State Farm, in this case. W.Va. Code 33-6-31, the pertinent statute relating to UM coverage, states as follows:

> (b)...nor shall any such policy or contract be so issued or delivered unless it shall contain an endorsement or provisions undertaking to pay the insured all sums which he shall be legally entitled to recover as damages from the owner or operator of an **UNINSURED MOTOR VEHICLE**, within limits which shall be no less than requirements of Section 17D-4-2...provided, that such policy or contract shall provide an option to the insured with appropriately adjusted premiums to pay the insured all sums which he shall be legally entitled to recover as damages from the owner or operator of an **UNINSURED MOTOR VEHICLE** up to an amount of One Hundred Thousand Dollars because of bodily injury to or death of one person in any one accident...

> (c) **UNINSURED MOTOR VEHICLE** shall mean a **motor vehicle** as to which there is no: (i) bodily injury liability insurance and property damage liability insurance both in the amount specified in 17D-4-2 or (ii) there is such insurance but the insurance company writing the same denies coverage.

Importantly, nowhere in W.Va. Code 33-6-31 does it state that the "uninsured motor vehicle" must be operated upon a public roadway at the time the insured is injured, as acknowledged by the lower court. As set forth herein, the language contained in W.Va. Code 33-6-31 is clear, and there is no exception when the motor vehicle is "off road".

As set forth above, W.Va. Code 33-6-31(b) and (c) use the term "motor vehicle" which carries a specific meaning pursuant to West Virginia law. W.Va. Code 17A-1-1(b) defines "motor vehicle" as every vehicle which is self propelled and every vehicle which is not propelled by electric power obtained from overhead trolley wires, but not operated upon rails. This definition clearly includes an ATV. W.Va. Code 17A-1-1(a) defines a "vehicle" as every device in, upon or by which any person or property is or may be transported or drawn upon a highway, excepting devices moved by human power or used exclusively upon stationary rails or tracks. Again, an ATV is certainly a device by which a person may be transported upon a public roadway. In fact, ATVs are permitted on certain

roadways under certain conditions. See, W.Va. Code 17F-1-1 et seq.

Recently enacted W.Va. Code 17F-1-9 defines an "all-terrain vehicle" or ATV as "any motor vehicle, 52 inches or less in width, having an unladen weight of eight hundred pounds or less, traveling on three or more low-pressured tires with a seat designed to be straddled by the rider; designed for or capable of travel over unimproved terrain". Referring back to 17A-1-1(b) it is clear that an ATV is considered a "motor vehicle". In fact, this conclusion was recently reached by this Court in *State of West Virginia ex rel. Sergent v. Nibert,* supra.

In *Sergent,* a writ of prohibition was granted and this Court held that an ATV constitutes a "motor vehicle". This Court made the following pertinent findings and conclusions in granting the writ of prohibition:

1. There is no dispute that the definitions provided by the legislature clearly include an all-terrain vehicle as a "motor vehicle".

2. There is no language in Chapter 17F that explicitly removes the use of an all-terrain vehicle from the reach of W.Va. Code 17B-4-3.

Importantly, *Sergent* involved a penal statute, namely W.Va. Code 17B-4-3, and penal statutes are to be construed strictly in favor of the defendant, and this Court still found that an ATV was a "motor vehicle" and that the criminal defendant violated the aforementioned penal statute.

Here, the Court is to construe the language of the State Farm policies and W.Va. Code 33-6-31 to effectuate the purpose and intent of W.Va. Code 33-6-31, which is to compensate innocent victims when injured by an uninsured motorist.

State Farm attempts to specifically exclude an ATV from the definition of an "uninsured motor vehicle". W.Va. 33-6-31 makes no such exception and does not permit State Farm to define "uninsured motor vehicle" in a way that the legislature does not. Here, State Farm attempts to apply its own definition of "uninsured motor vehicle" when its definition is directly contrary to W.Va. Code 33-6-31 and West Virginia law.

State Farm contends that the separately enacted statute, 17F-1-1 et seq., makes the subject vehicle an ATV but somehow not a "motor vehicle" for UM purposes. This contention is rejected by this Court in *Sergent* as the Court specifically found that there is no specific language in 17F that removes the use of an ATV from the reach of W.Va. Code 17B-4-3 (regarding operation of a "motor vehicle"). Likewise, there is no such language in 17F explicitly removing the use of an ATV from the reach of W.Va. Code 33-6-31, especially when this Court found that the definition of a motor vehicle clearly includes an ATV. Simply put, the ATV which Mr. Kuchinski was operating at the time that Ms. Boniey was injured was and is a "motor vehicle".

State Farm's policies define an uninsured motor vehicle, on page 11, in the same manner as W.Va. Code 33-6-31(b), however, State Farm's policy language goes one step further and adds that an uninsured motor vehicle does not include a motor vehicle "designed for use mainly off public roads, except while on public roads". Clearly, State Farm tries to restrict or change the definition of an uninsured motor vehicle as set forth in W.Va. Code 33-6-31, which if contrary to the statute, is void and ineffective. *Mitchell v. Broadnax*, 208 W.Va. 36, 536 S.E.2d 882 (2000). State Farm's language excluding an ATV

from the definition of an uninsured motor vehicle is contrary to W.Va. Code 17A-1-1(b), and W.Va. Code 33-6-31.

Importantly, uninsured motorist coverage is first party coverage in West Virginia. The law has been very consistent that policy exclusions cannot defeat the purposes and intent of W.Va. Code 33-6-31 and any such exclusions will be rendered void. *Deel v. Sweeney*, 181 W.Va. 460, 383 S.E.2d 92 (1989), *Alexander v. State Auto Mut. Ins. Co.*, 187 W.Va. 72, 415 S.E.2d 618 (1992); *Thomas v. Nationwide Mut. Ins. Co.*, 188 W.Va. 640, 425 S.E.2d 595 (1992).

The exclusionary language relied upon by State Farm clearly conflicts with the spirit and intent of §33-6-31 and is therefore void and ineffective. West Virginia Code, §33-6-31 is titled **"Motor Vehicle Policy; Omnibus Clause; Uninsured and Underinsured Motorists' Coverage; Conditions for Recovery Under Endorsement; Rights and Liabilities of Insured."** W.Va. Constitution Article VI, Section 30, requires that the object of an act of the Legislature "shall be expressed in the title". In fact, you can look to the title of the statute to ascertain intent. See, *City of Huntington v. State Water Comm.*, 64 S.E.2d 225 (W.Va. 1951). The primary, if not sole purpose and

intent of the Uninsured Motorist Statute is to provide coverage for insureds injured by the owners or operators of uninsured motor vehicles. See, *Perkins v. Doe*, 350 S.E.2d 711 (W.Va. 1986).

In support of its position, State Farm cites *Imgrund v. Yarborough*, 199 W.Va. 187 (1997). In reviewing *Yarborough*, we see, at the outset, an exclusion separate and distinct from that currently before the Court. *Yarborough* dealt only with an "owned but not insured exclusion" to uninsured motorist coverage. Specifically, Mr. Imgrund, who was operating his motorcycle at the time of his accident and injuries, claimed uninsured motorist coverage from his parents' Nationwide Automobile Insurance policy, in addition to the uninsured motorist coverage he had purchased on his motorcycle from Colonial Insurance Company of California. Nationwide refused to pay Imgrund's claim for the additional uninsured motorist coverage under his parents' policies, citing the "owned but not insured" provision contained in the Nationwide policy. An appeal followed the circuit court's finding in favor of Mr. Imgrund.

The Court in *Yarborough* determined that an "owned but not insured exclusion" to uninsured motorist coverage is valid and

enforceable but only above the mandatory limits of uninsured motorist coverage as required by West Virginia Code §§17D-4-2 and 33-6-31(b).

Of course, the State Farm exclusionary language at issue has nothing at all to do with the "owned but not insured" scenario. Ms. Boniey, unlike Mr. Imgrund, was not on a vehicle which she owned and for which there was uninsured coverage. Thus, for Ms. Boniey, the **only** insurance available to compensate her is the uninsured motorist coverage provided by the two (2) State Farm policies at issue.

This Court, in *Yarborough*, emphasized on numerous occasions within the opinion that the decision finding the "owned but not insured" exclusion was supported by the fact that the plaintiff, Mr. Imgrund, had already received uninsured motorist coverage from his own policy, which represents an insurmountable distinction that State Farm cannot overcome. This Court, in fact, emphasized, in recognizing the Nationwide exclusion, that Imgrund's statutory right to receive a minimum amount of uninsured motorist coverages has not been violated in this case." Id. at 193 (Emphasis added). The Court further noted that Mr. Imgrund "could have opted to obtain uninsured motorist coverage above the minimum statutory requirements upon the payment of appropriately adjusted premiums." Id. at 194.

The Court recognized an insurance company's ability to limit its liability, so long as the limitations are not in conflict with the spirit and intent of the Uninsured Motorist Statute and the premium charged is consistent with the proposed limitation. See, *Deel v. Sweeney*, and *Mitchell v. Broadnax*, supra.

This Court, however, reiterated the limited nature of its ruling when it cautioned insurance companies that "this Court will continue to be vigilant in holding the insurers' feet to the fire in instances where exclusions or denials of coverage strike at the heart of the purposes of the Uninsured Motorist Statute provisions, which State Farm's exclusions attempt to do. *Yarborough*, 199 W.Va. at 195; citing *Deel v. Sweeney*, 181 W.Va. at 463.

For Mr. Imgrund, the Court noted that he had purchased the minimum coverage on the motorcycle he was driving at the time he was injured, but attempted to also collect under the policy of insurance covering the two (2) vehicles which his parents owned and for which he did not pay any premiums. Obviously, Ms. Boniey was not operating her own vehicle when she was injured, as Mr. Kuchinski was the owner of the uninsured motor vehicle. Thus, the "owned but not insured" exclusion could not apply to this scenario and we are left with only two (2)

policies of insurance, under which Ms. Boniey is clearly an insured, providing $120,000 in coverage, for which premiums were paid.

The prevailing position of our State Supreme Court, which has not been altered by *Yarborough*, is that the spirit and intent of W.Va. Code §33-6-31, consistent with the pre-eminent public policy, is that the insurer is to provide full compensation, not exceeding coverage limits, to an injured person for his or her damages not compensated by a negligent tortfeasor. See, *Pristavec v. Westfield Insurance Company*, 184 W.Va. 331, 400 S.E.2d, 575 (1990). Further, with regard to uninsurance coverage, it has been held that West Virginia Code §33-6-31 is remedial in nature and therefore must be construed liberally in order to effect its purpose. See, *Perkins v. Doe*, 350 S.E.2d 711 (W.Va. 1986). These principles mandate coverage for Ms. Boniey under the State Farm policies.

Ms. Boniey does not have available to her any uninsured coverage through another policy to which she is attempting to bootstrap to the State Farm coverages. The only policies of insurance that she has available to her are the State Farm policies, for which premiums have been charged and paid. State Farm asserts that recreational policies covering ATVs are available. However, contrary to State Farm's contentions, Ms.

Boniey could not have purchased a separate recreational policy containing UM coverage for her use as a passenger on the ATV as she did not own an ATV. Ms. Boniey was a passenger on the ATV and the only UM coverage available to her was through her automobile coverage with State Farm.

Most troubling in this matter is that State Farm attempts to do something for which there is simply no basis in the law to do. They seek to exclude a particular motor vehicle from the statute's mandate when the law is clear that the statute's mandate cannot be altered by policy exclusions. If State Farm can exclude an ATV from the definition of an uninsured motor vehicle in this instance, allowing them to deny coverage to Ms. Boniey, then State Farm and all other insurers soon thereafter will then exclude other motor vehicles, such as "pick-up trucks" when operated off a public roadway from the definition of "uninsured motor vehicle" and the reaches of W.Va. Code 33-6-31 in order to deny coverage. Where will it end? If State Farm's position is accepted, it will now have a sufficient precedent to implement exclusions which *Deel* and *Yarborough* and §33-6-31 do not authorize.

As well, it cannot be overlooked that the Legislature knew, when it enacted Chapter 17F, that an ATV was a motor vehicle consistent with the finding in the *State ex rel.*

Sergent v. Nibert case. It follows that, if the Legislature intended to exclude ATVs from the definition of "motor vehicle" as contemplated in §33-6-31, it would have done so. The Legislature would simply have amended West Virginia Code §33-6-31 to include language similar to the following, "...an uninsured motor vehicle, excluding an ATV as defined in Chapter 17F...". However, the Legislature elected not to do so and did not exclude ATVs from the reaches of §33-6-31 and State Farm's exclusionary language cannot now do so. In other words, State Farm's exclusionary language cannot do what the Legislature has voluntarily and intentionally elected not to do. This Court has been consistent over the years and has repeatedly stated that the Court will not legislate from the bench. If the Legislature desires to exclude ATVs, when operated off road, from the reaches of W.Va. Code 33-6-31, it can easily do so. However, it has not elected to do so to this point.

This Court is encouraged to continue the long-standing rule that the spirit and intent of the Uninsured Motorist Statute not be undermined by exclusions such as the one at issue in this matter, as the same is in direct conflict with that spirit and intent to provide full compensation to an injured person suffered at the hands of a negligent, and uninsured, tortfeasor. The *Yarborough* decision applied to a very limited exclusion, namely the "owned but not insured

exclusion". Here, Ms. Boniey is not seeking some secondary coverage, but is seeking the only UM coverage that is available for her and her family.

State Farm's main contention, that the exclusion should be applied because the incident wherein Ms. Boniey was injured did not occur on a public roadway, is unsupported by law. The lower court correctly held that,

> It is clear from reading the UM statute **that where the motor vehicle is being operated is not determinative** of whether the statute and UM coverage applies. The statute makes no distinction between motor vehicles operated on public roads and highways and motor vehicles operated off the public roads and highways. The statute simply applies to any motor vehicle. (Emphasis added).

When the language contained within a statute is clear, the language is to be applied and not construed. Moreover, as a practical matter, State Farm's argument is seriously flawed. For example, under State Farm's rationale, an intoxicated operator of an ATV that is operating the ATV recklessly but stays off the public roadway could not be charged with DUI as State Farm would contend that the ATV would not constitute a "motor vehicle" while it was being operated off the roadway.

Certainly, this is not the law in West Virginia and the intoxicated driver of the ATV, under the factual scenario as set forth above, could be charged with a DUI even when operating the ATV off of a public roadway.

Another example to refute State Farm's rationale would be if Mr. Driver was operating an ATV with Ms. Passenger as his passenger, on a public roadway, when they come upon an accident in the middle of the road. To avoid the accident, Mr. Driver pulls off the roadway to go around the scene, and while off the roadway, Mr. Driver negligently operates the ATV injuring the passenger. Under State Farm's theory, the passenger had UM coverage one minute, while on the roadway, but lost her UM coverage the next minute, while off the roadway, through no fault of her own. This cannot be the intent and purpose of the UM statute. The statute is designed to protect innocent victims from uninsured motorists, and it would not be consistent with the UM statute if UM coverage existed one minute and was gone the next simply because the driver drove the vehicle off of a roadway.

State Farm tacitly admits that an exclusion, such as theirs, is void as against the UM statute. On page 11 of its brief, State Farm states,

> Plaintiff below argues that State Farm's rationale is flawed and that adopting State Farm's reasoning will cause "a slippery slope" with regard to UM exclusions. Plaintiff's concern, however, is ill-founded. Plaintiff below argued that excluding ATVs from coverage when operated off-road opens the door to excluding certain makes or models of automobiles or excluding classes of automobiles. Such argument is nonsensical and non-persuasive. First, **automobiles** are intended to be covered by W.Va. Code 33-6-31. **Any attempt to exclude a particular type of automobile would be void as against the statute and public policy.**

State Farm claims that "automobiles" are intended to be covered by W.Va. Code 33-6-31 and any attempt to exclude a particular type of "automobile" would be void. However, "automobile" is not the operative word found in W.Va. Code 33-6-31. The UM statute uses the precise term "uninsured motor vehicle". Thus, an exclusion of a particular "motor vehicle" is void as W.Va. Code 33-6-31 specifically uses the term "motor vehicle" and not automobile.

Not surprisingly, State Farm attempts to persuade this Court with the "increased premium" argument. The coverage as found by Judge Recht applies to a very limited set of facts wherein Ms. Boniey, an innocent passenger on an ATV, was injured by an uninsured operator of a motor vehicle. Ms. Boniey was insured with UM benefits. The lower court's ruling does not extend, nor did plaintiff seek to extend, liability

coverage to ATV drivers, but involves first party protections bought and paid for with valuable premiums. Premiums were paid to protect Ms. Boniey from damages caused by the operator of an uninsured motor vehicle as that term is defined by West Virginia law.

However, State Farm has not offered any evidence of any increased risks that State Farm or any other insurer will be subjected to as a result of Judge Recht's ruling. In fact, when asked by the lower court, State Farm could not even recall addressing or handling a claim of this type in the past, indicating that this is an unusual factual pattern specific to this case which will not open up some unforeseen risks to State Farm. State Farm's allegations of increased premiums is not supported or proven in any way, and, in fact, it is actually negated by the fact that State Farm has never dealt with this issue before this case.

This Court, in *Mitchell v. Broadnax*, in Syllabus points 5, 6 and 8 respectively, held as follows:

> 5. When an insurer incorporates, into a policy of motor vehicle insurance, an exclusion pursuant to W.Va. Code §33-6-31(k) (1995) (Repl. Vol. 1996), the insurer must adjust the corresponding policy premium so that the exclusion is "consistent with the premium charged". Syllabus point 5, *Mitchell v. Broadnax*, 537 S.E.2d 882 (W.Va. 2000).

> 6. When an insurer has failed to satisfy the statutory criteria of W.Va. Code §33-6-31(k) (19985) (Repl. Vol. 1996) requisite to incorporating an exclusion in a policy of motor vehicle insurance, the enforcement of such an exclusion is violative of this State's public policy. Syllabus point 6, *Mitchell v. Broadnax*, 537 S.E.2d 882 (W.Va. 2000).
>
> 8. "An insurer wishing to avoid liability on a policy purporting to give general or comprehensive coverage must make exclusionary clauses conspicuous, plain, and clear, placing the in such a fashion as to make obvious their relationship to other policy terms, and must bring such provisions to the attention of the insured". Syllabus point 10, *National Mutual Insurance Co. v. McMahon & Sons, Inc.*, 177 W.Va. 734, 356 S.E.2d 488 (1987).

Pursuant to the mandate contained in *Broadnax*, State Farm has failed to offer any proof whatsoever that the policy premiums were appropriately adjusted, thus the exclusionary language cannot be enforced.

State Farm also asserts that ATVs are dangerous and that they should not have to bear the burden for these dangerous machines. There is no proof whatsoever that an ATV is any more dangerous than a "motorcycle" or any other type of motor vehicle, which they insure. Any motor vehicle negligently operated is a dangerous instrument.

As for public policy, ATVs are motor vehicles in West Virginia that can be and are legally operated by the citizens of West Virginia on (under certain circumstances) and off public roadways. Insureds who pay valuable premiums to protect themselves against uninsured motorists should not be penalized because the motor vehicle just happened to be off a public roadway at the time of the incident.

State Farm asserts that there would have been coverage if the ATV was operated on a public roadway. However, ATVs can only be legally operated on a public roadway in very limited circumstances pursuant to W.Va. Code 17F. Thus, most times the operation of an ATV on a public highway or roadway would be illegal. How can State Farm reconcile the fact that if Brian Kuchinski was operating the ATV on a public highway, although illegally, Jennifer Boniey would be entitled to UM benefits under the State Farm policies; however, if the operation of the ATV was off road, although legal, Jennifer Boniey would not be entitled to UM benefits.

It would be against public policy that Ms. Boniey would be insured when the tortfeasor operated the ATV illegally; yet, uninsured when the ATV was operated legally, but negligently. To accept State Farm's argument in this case would be to punish Jennifer Boniey for engaging in legal activity, and reward one

engaged in illegal activity of operating an ATV on a public highway even if not authorized by W.Va. Code 17F.

As for additional public policy arguments, West Virginia law is clear that the pre-eminent public policy of W.Va. Code 33-6-31 is to provide full compensation to an injured person for his or her damages not compensated by a negligent tortfeasor. See, *Pristavec v. Westfield Insurance Co.*, supra. Moreover, the primary, if not the sole purpose of mandatory uninsured motorist coverage, is to protect innocent victims from the hardships caused by negligent, financially irresponsible drivers. See, *Perkins v. Doe*, supra.

State Farm requests this Court to apply the exclusionary language to defeat this public policy. As for the factors to be considered in determining the propriety of the exclusion, State Farm cannot satisfy any factor. The factors to consider include,

1. The language of the exclusion itself - Here, State Farm's exclusionary language is in direct conflict with W.Va. Code 17A, 17F, 33-6-31, and West Virginia case law;

2. The effect of the application of the exclusionary language - Here, the effect will be to deny insurance coverage

to an innocent victim injured by the operator of an uninsured motor vehicle, and to allow State Farm to do what the Legislature has elected not to do;

3. The availability of another recovery - Here, unlike *Yarborough*, Ms. Boniey has no other available insurance coverage to recover;

4. Public policy behind enforcement - There is no public policy reason to enforce the exclusion. In fact, the exclusion violates the long standing public policy behind the UM statute.

Thus, the exclusionary language should not be enforced and should be rendered violative of W.Va. Code 33-6-31 and therefore void and ineffective.

The State of West Virginia has consistently and vigorously protected the rights of innocent, injured victims. W.Va. Code 33-6-31 provides for mandatory uninsured motorist coverage to protect against financially irresponsible operators of motor vehicles. In the insurance coverage context, this Court has repeatedly rejected exclusions that attempt to totally defeat mandatory coverage.

For example, in *Jones v. Motorists Mutual Ins. Co.*, 356 S.E.2d 634 (W.Va. 1987) the Court attempted to reconcile West Virginia Code 33-6-31(a) allowing named driver exclusions, with West Virginia Code 17D-4-2 (1991) setting mandatory minimum insurance coverage limits on account of an accident arising out of the ownership, operation, maintenance or use of a motor vehicle.

The Court concluded,

> A 'named driver exclusion' endorsement in a motor vehicle liability insurance policy in this State is of no force or effect up to the limits of financial responsibility required by W.Va. Code 17D-4-2 [1979]; however, above those mandatory limits, or with regard to the property of the named insured himself, a 'named driver exclusion' endorsement is valid under W.Va. Code 33-6-31(a) [1982].

Thus, the legislative intent of protection of the general public from negligent drivers took precedence over an insurer's allowance to specifically refuse to insure a driver.

The law is clear that the mandatory requirement of insurance coverage take precedence over any contrary or restrictive language in an automobile liability insurance policy. See also, *Miller v. Lambert*, 464 S.E.2d 582 (W.Va. 1995).

Here, the mandatory requirement of UM coverage takes precedence over any restrictive language in the policy attempting to exclude an ATV from the definition of an uninsured motor vehicle.

West Virginia has consistently found minimum coverage mandated by statute despite specific insurance language defeating such coverage. (See, *Jones v. Motorist Mutual*, 356 S.E.2d 634 (W.Va. 1987) wherein a named driver exclusion was of no force or effect up to the limits of financial responsibility required by 17D-4-2; *Dotts v. Taressa*, 390 S.E.2d 568 (W.Va. 1990) wherein an intentional tort exclusion in a motor vehicle policy is precluded under the Motor Vehicle Safety Responsibility law up to the minimum insurance coverage required therein).

In addition, in *Ward v. Baker*, 425 S.E.2d 245 (W.Va. 1992), this Court held that the liability carrier must provide minimum mandatory coverage set forth in West Virginia Code 17D-4-2 (1991) even where the driver was a named excluded driver operating the vehicle <u>without</u> the insured's consent.

Appellee asserts, and as the lower court found, that State Farm owes the entire policy limits in this case. However, if

the Court decides otherwise, then State Farm, at a minimum, is obligated to pay the mandatory minimum limits in this case.

Lastly, the doctrine of reasonable expectations should also serve to defeat the efforts of State Farm to exclude UM coverage. The doctrine of reasonable expectations was first adopted in West Virginia in *National Mutual Ins. Co. v. McMahon & Sons, Inc.*, 356 S.E.2d 488 (W.Va. 1987) which held:

> With respect to insurance contracts, the doctrine of reasonable expectations is that the objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations. Syllabus pt. 8 (emphasis added)

In essence, this doctrine recognizes the insured's reasonable belief of coverage for which they pay a premium. State Farm, however, through exclusionary language, which contradicts the legislature's definition of "motor vehicle" and, if effective, which undermines and directly conflicts with the spirit and intent of the UM statute, seeks to avoid paying coverage which Ms. Boiney reasonably expects to recover. To allow State Farm to prevail, when the exclusionary language at issue seeks to accomplish something the legislature has not allowed and which existing case law does not support, clearly ignores the reasonable expectations of Ms. Boiney, an intended beneficiary of the State Farm insurance policies.

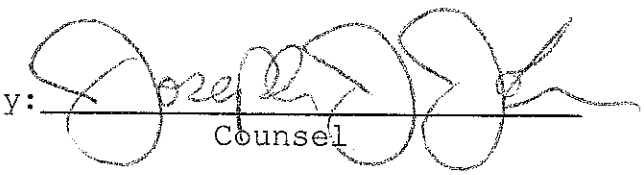
CONCLUSION

The lower court did not err by honoring the spirit and intent of W.Va. Code 33-6-31 by finding that the State Farm exclusion is void and ineffective. The exclusion that State Farm relies upon in an attempt to deny Ms. Boniey UM coverage strikes at the very heart of the UM statute and her ability to recover UM benefits as contemplated by W.Va. Code 33-6-31, and violates the doctrine of reasonable expectations. State Farm improperly changed the definition of uninsured motor vehicle from that provided by the Legislature and which altered definition cannot have any force or effect. The lower court was correct in finding that Ms. Boniey is entitled to recover the UM coverage purchased for her benefit and her family's benefit which was intended to protect her from an uninsured driver of a motor vehicle as contemplated by W.Va. Code 33-6-31.

PRAYER FOR RELIEF

WHEREFORE, your appellee, Jennifer Boniey, respectfully prays that the lower court's Order be affirmed and for such other and further relief as the Court deems just and proper.

Respectfully submitted,
Jennifer Boniey, appellee

By: 
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CERTIFICATE OF SERVICE

Service of the foregoing appellee's brief was made upon the appellant by mailing a true copy thereof, US Mail, postage prepaid, to their attorney E. Kay Fuller, Esq., P.O. Box 1286, Martinsburg, WV 25402 on this 8th day of August, 2008.

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